

Information and Privacy Commissioner,  
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,  
Ontario, Canada

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## ORDER MO-4075

Appeal MA19-00569

Township of Ramara

June 25, 2021

**Summary:** At issue in this appeal is whether certain records held by an elected councillor for the Township of Ramara (the township) are in the custody or under the control of the township for the purposes of section 4(1) of the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) and whether the township conducted a reasonable search for records that are responsive to the appellant's access request. In this order, the adjudicator finds that some records held by the councillor are in the custody or under the control of the township for the purposes of section 4(1) but others are not. In addition, he finds that as a result of additional search efforts made by the township during the inquiry, it conducted a reasonable search for the records sought by the appellant, as required by section 17 of the *Act*. He orders the township to issue an access decision to the appellant with respect to the additional records that it located, except for those that are not in its custody or under its control for the purposes of section 4(1) of the *Act*.

**Statutes Considered:** *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 4(1) and 17.

**Orders Considered:** Orders M-813, MO-2821 and MO-3471.

**Cases Considered:** *St. Elizabeth Home Society v. Hamilton (City)*, (2005), 148 A.C.W.S. (3d) 497 (Ont. Sup. Ct.); *City of Ottawa v. Ontario*, 2010 ONSC 6835 (Div. Ct.); *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25, [2011] 2 SCR 306.

### OVERVIEW:

[1] The appellant works for a company that had a contract to provide specific

services to the Township of Ramara (the township). On June 3, 2019, the Committee of the Whole, which is made up of elected councillors, met and then passed a motion to terminate the township's contract with the company. The following day, the township sent a letter to the company providing 30 days' notice of termination of the contract. On June 21, 2019, the appellant and other representatives of his company met with the town administration and elected officials, including a particular councillor, who apparently had a binder of documents with him.

[2] The appellant later submitted an access request to the township under the *Act* for the following records:

Time Period – February 4<sup>th</sup> 2019 to June 30<sup>th</sup> 2019. Copy of Binder Materials from June 21<sup>st</sup> meeting with [named councillor]. All correspondence between Council Members, Staff, regarding the incident at [identified location] Feb. 4<sup>th</sup>, 2019 leading to the decision of June 3<sup>rd</sup> 2019 (C.W. 255.19)

Disclosure of any subsequent discussions between [named councillor], his elected and staff colleagues, the insured(s) and insurers in the said property incident as he disclosed to us he had been in direct communications with property owners and their insurers.

[3] In response, the township sent a decision letter to the appellant and disclosed a number of records to him. It withheld some information in one record under the mandatory exemption in section 14(1) (personal privacy) of the *Act*. The township's decision letter also stated that, "[The named councillor] has refused to provide the records in his possession and he has been informed that you have the option to appeal the decision."

[4] The appellant appealed the township's decision to the Information and Privacy Commissioner of Ontario (IPC), which assigned a mediator to assist the parties in resolving the issues in dispute.

[5] During mediation, the appellant stated that he is not seeking access to the information that the township withheld from one record under section 14(1) of the *Act*. As a result, that information and the section 14(1) exemption are not at issue in this appeal.

[6] However, the appellant stated that he believes that additional records should exist, namely an email sent from the councillor to the mayor and the deputy mayor. The appellant referenced another email where the councillor states that he sent an email to the mayor and deputy mayor. In response, the township confirmed that it had searched for this record and the mayor's office did not locate it. The appellant continues to believe that this record should exist. Accordingly, whether the township conducted a reasonable search for this email is at issue in this appeal.

[7] The appellant also stated that he continues to seek access to the records in a

binder that the councillor apparently brought to a meeting with the appellant and others on June 21, 2019. The township stated that despite requesting these records from this councillor, he did not provide them. The appellant continues to seek access to these records. Accordingly, whether these records are in the custody or under the control of the township for the purposes of section 4(1) of the *Act* is at issue.

[8] I sought and received representations on the issues to be resolved in this appeal from both the township and the appellant. I also sought and received representations from the councillor on whether the records sought by the appellant are in the township's custody or under its control for the purposes of section 4(1) of the *Act*.

[9] In this order, I find that:

- any records relating to the matter involving the appellant's company held by the councillor that he sent or copied to the township's officers or employees, including emails from him, are in the custody or under the township's control for the purposes of section 4(1) of the *Act*;
- any records relating to the appellant's company held by the councillor that he did not send or copy to the township's officers or employees, such as emails to third parties, are the councillor's political records and are not in the township's custody or under its control for the purposes of section 4(1); and
- as a result of additional search efforts made by the township during the inquiry, it conducted a reasonable search for the records sought by the appellant, as required by section 17 of the *Act*.

[10] I order the township to issue an access decision to the appellant with respect to the additional records that were located by its IT department, except for any email exchanges between the councillor and third parties that he did not send or copy to the township's officers or employees.

## **ISSUES:**

- A. Are the records "in the custody" or "under the control" of the township under section 4(1) of the *Act*?
- B. Did the township conduct a reasonable search for records?

## **DISCUSSION:**

### **A. Are the records "in the custody" or "under the control" of the township under section 4(1) of the *Act*?**

Section 4(1) reads, in part:

Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless . . .

[11] Under section 4(1), the *Act* applies only to records that are in the custody or under the control of an institution. A record will be subject to the *Act* if it is in the custody or under the control of an institution; it need not be both.<sup>1</sup>

[12] A finding that a record is in the custody or under the control of an institution does not necessarily mean that a requester will be provided access to it.<sup>2</sup> A record within an institution's custody or control may be excluded from the application of the *Act* under one of the provisions in section 52, or may be subject to a mandatory or discretionary exemption (found at sections 6 through 15 and section 38).

[13] The appellant is seeking access to a copy of the records in a binder that the councillor apparently brought to a June 21, 2019 meeting with the appellant and others. The township states that it requested these records from the councillor, but he did not provide them. Accordingly, it must be determined whether these records are in the custody or under the control of the township for the purposes of section 4(1) of the *Act*.

[14] The appellant believes, based on his interactions with the councillor at the June 21, 2019 meeting, that this binder contains copies of emails from the councillor to a number of parties, including individuals at the township (such as the mayor and deputy mayor) and third parties outside the township, such as representatives of a condo board and an insurance company.

## **Factors**

[15] The courts and the IPC have applied a broad and liberal approach to the custody or control question.<sup>3</sup> Based on this approach, the IPC has developed a list of factors to consider in determining whether or not a record is in the custody or control of an institution, as follows.<sup>4</sup> The list is not intended to be exhaustive. Some of the listed factors may not apply in a specific case, while other unlisted factors may apply.

- Was the record created by an officer or employee of the institution?<sup>5</sup>
- What use did the creator intend to make of the record?<sup>6</sup>

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<sup>1</sup> Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, 2011 ONSC 172 (Div. Ct.).

<sup>2</sup> Order PO-2836.

<sup>3</sup> *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 4072; *Canada Post Corp. v. Canada (Minister of Public Works)* (1995), 30 Admin. L.R. (2d) 242 (Fed. C.A.) and Order MO-1251.

<sup>4</sup> Orders 120, MO-1251, PO-2306 and PO-2683.

<sup>5</sup> Order 120.

- Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the record?<sup>7</sup>
- Is the activity in question a “core”, “central” or “basic” function of the institution?<sup>8</sup>
- Does the content of the record relate to the institution’s mandate and functions?<sup>9</sup>
- Does the institution have physical possession of the record, either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement?<sup>10</sup>
- If the institution does have possession of the record, is it more than “bare possession”?<sup>11</sup>
- If the institution does not have possession of the record, is it being held by an officer or employee of the institution for the purposes of his or her duties as an officer or employee?<sup>12</sup>
- Does the institution have a right to possession of the record?<sup>13</sup>
- Does the institution have the authority to regulate the record’s content, use and disposal?<sup>14</sup>
- Are there any limits on the use to which the institution may put the record, what are those limits, and why do they apply to the record?<sup>15</sup>
- To what extent has the institution relied upon the record?<sup>16</sup>
- How closely is the record integrated with other records held by the institution?<sup>17</sup>

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<sup>6</sup> Orders 120 and P-239.

<sup>7</sup> Order P-912, upheld in *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, cited above.

<sup>8</sup> Order P-912.

<sup>9</sup> *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above; *City of Ottawa v. Ontario*, 2010 ONSC 6835 (Div. Ct.), leave to appeal refused (March 30, 2011), Doc. M39605 (C.A.) and Orders 120 and P-239.

<sup>10</sup> Orders 120 and P-239.

<sup>11</sup> Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above.

<sup>12</sup> Orders 120 and P-239.

<sup>13</sup> Orders 120 and P-239.

<sup>14</sup> Orders 120 and P-239.

<sup>15</sup> *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above.

<sup>16</sup> *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above and Orders 120 and P-239.

- What is the customary practice of the institution and institutions similar to the institution in relation to possession or control of records of this nature, in similar circumstances?<sup>18</sup>

[16] The following factors may apply where an individual or organization other than the institution holds the record:

- If the record is not in the physical possession of the institution, who has possession of the record, and why?<sup>19</sup>
- Is the individual, agency or group who or which has physical possession of the record an "institution" for the purposes of the *Act*?
- Who owns the record?<sup>20</sup>
- Who paid for the creation of the record?<sup>21</sup>
- What are the circumstances surrounding the creation, use and retention of the record?<sup>22</sup>
- Are there any provisions in any contracts between the institution and the individual who created the record in relation to the activity that resulted in the creation of the record, which expressly or by implication give the institution the right to possess or otherwise control the record?<sup>23</sup>
- Was there an understanding or agreement between the institution, the individual who created the record or any other party that the record was not to be disclosed to the institution?<sup>24</sup> If so, what were the precise undertakings of confidentiality given by the individual who created the record, to whom were they given, when, why and in what form?
- Is there any other contract, practice, procedure or circumstance that affects the control, retention or disposal of the record by the institution?
- Was the individual who created the record an agent of the institution for the purposes of the activity in question? If so, what was the scope of that agency,

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<sup>17</sup> Orders 120 and P-239.

<sup>18</sup> Order MO-1251.

<sup>19</sup> PO-2683.

<sup>20</sup> Order M-315.

<sup>21</sup> Order M-506.

<sup>22</sup> PO-2386.

<sup>23</sup> *Greater Vancouver Mental Health Service Society v. British Columbia (Information and Privacy Commissioner)*, [1999] B.C.J. No. 198 (S.C.).

<sup>24</sup> Orders M-165 and MO-2586.

and did it carry with it a right of the institution to possess or otherwise control the records? Did the agent have the authority to bind the institution?<sup>25</sup>

- What is the customary practice of the individual who created the record and others in a similar trade, calling or profession in relation to possession or control of records of this nature, in similar circumstances?<sup>26</sup>
- To what extent, if any, should the fact that the individual or organization that created the record has refused to provide the institution with a copy of the record determine the control issue?<sup>27</sup>

[17] In determining whether records are in the “custody or control” of an institution, the above factors must be considered contextually in light of the purpose of the legislation.<sup>28</sup>

[18] In *Canada (Information Commissioner) v. Canada (Minister of National Defence)*,<sup>29</sup> the Supreme Court of Canada adopted the following two-part test on the question of whether an institution has control of records that are not in its physical possession:

1. Do the contents of the document relate to a departmental matter?
2. Could the government institution reasonably expect to obtain a copy of the document upon request?

### **Municipal councillors**

[19] The issue of whether records held by elected councillors are in the custody or under the control of a municipality is complex and not clearly spelled out in the *Act*.

[20] The *Act* only applies to records that are in the custody or under the control of an “institution.” The term “institution” is defined in section 2(1) of the *Act*, and includes a municipality. However, the definition of “institution” does not specifically refer to elected offices such as a municipal councillor.

[21] In *St. Elizabeth Home Society v. Hamilton (City)*,<sup>30</sup> the Ontario Superior Court of Justice described the relationship between a municipality and elected members of council as follows:

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<sup>25</sup> *Walmsley v. Ontario (Attorney General)* (1997), 34 O.R. (3d) 611 (C.A.) and *David v Ontario (Information and Privacy Commissioner) et al* (2006), 217 O.A.C. 112 (Div. Ct.).

<sup>26</sup> Order MO-1251.

<sup>27</sup> Order MO-1251.

<sup>28</sup> *City of Ottawa v. Ontario*, *supra* note 9.

<sup>29</sup> 2011 SCC 25, [2011] 2 SCR 306.

<sup>30</sup> (2005), 148 A.C.W.S. (3d) 497 (Ont. Sup. Ct.).

It is [a] principle of municipal law that an elected member of a municipal council is not an agent or employee of the municipal corporation in any legal sense. Elected members of council are not employed by or in any way under the control of the local authority while in office.... Individual council members have no authority to act for the corporation except in conjunction with other members of council constituting a quorum at a legally constituted meeting; with the exception of the mayor or other chief executive officer of the corporation, they are mere legislative officers without executive or ministerial duties.

[22] In Order M-813, the adjudicator reviewed this area of the law and found that records held by municipal councillors may be subject to an access request under the *Act* in two situations:

- where a councillor is acting as an “officer” or “employee” of the municipality, or is discharging a special duty assigned by council, such that they may be considered part of the “institution”; or
- where, even if the above circumstances do not apply, the councillor’s records are in the custody or under the control of the municipality on the basis of established principles.

[23] In Order MO-3471, the adjudicator identified the approach taken by the IPC to records held by municipal councillors as follows:

Based on consideration of [the above] factors, several previous orders of this office have found that city councillors’ communications were not in the custody or under the control of the city in the circumstances of those appeals.<sup>31</sup> For example, in Order MO-2821, communications between City of Toronto councillors about cycling issues were found not to be under the control of the city. The adjudicator in that appeal distinguished between city records, on one hand (which would be subject to the *Act*), and personal or political records, on the other (which would not), and found the records at issue to fall in the latter category.

### **Analysis and findings**

[24] The issue that must be resolved here is whether the records in the binder that the councillor apparently brought to the June 21, 2019 meeting with the appellant and others, are in the custody or under the control of the township for the purposes of section 4(1) of the *Act*.

[25] Both the township and the councillor provided brief representations on this issue.

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<sup>31</sup> See Orders MO-2821, MO-2878, MO-2749, MO-2610, MO-2842 and MO-2824.



The township states:

The records are not in the township's possession. We can ask members of Council to submit records, but if they do not actively submit them, we do not have access to them.

[26] In his representations, the councillor simply states, "I do not have the binder that is being requested."

[27] The appellant provided more detailed representations on this issue. He submits that the records in the binder that the councillor brought to the June 21, 2019 meeting should be considered to be part of the "municipal record" and in the custody or under the control of the township for the purposes of section 4(1) of the *Act*.

[28] The appellant acknowledges that unlike the mayor, who is an officer of the township, councillors are not employed by the township. However, he relies on previous jurisprudence that has found that where a councillor is acting as an "officer" or "employee" of the municipality, or is discharging a special duty assigned by council, that councillor may be considered part of the "institution."<sup>32</sup> He raises the possibility that the councillor who brought the binder to the June 21, 2019 meeting may be an "officer" of the township because that councillor attended in his capacity as chair/presiding officer of the Protective Services Committee. He submits that the councillor created the records in the binder in his capacity as the chair of that committee.

[29] The appellant further submits that any records created by the councillor relating to the decision-making that took place with respect to his company should be viewed as being "owned" by the municipality. He states, in part:

My position is that [the councillor] acted as the Chair/Presiding Officer of the Protective Services Committee. He used the record he created to bring about a decision by Council. . . . His failure to produce the record is thwarting the effort to determine if the decision making was done in the public's interest.

In our Meeting June 21<sup>st</sup> [the councillor] referred to his direct communications with several people and entities (condo board representatives, insurance company representatives, emails to both the Mayor and Deputy Mayor to name but a few). The record of those communications we believe are in the binder and should be considered part of the Municipal Record. They were used to provide direction in-camera and affirm resolutions in public session.

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<sup>32</sup> Order M-813.

As a Councillor, Chair/Presiding Officer of the Protective Services Committee, [the councillor] is also paid by the Municipality. His time to create this record was paid for by the Municipality. The record is owned by the Municipality not [the councillor]. . . .

[30] I have considered the parties' evidence and for the reasons that follow, find that any records relating to the matter involving appellant's company that the councillor sent or copied to the township's officers or employees, including emails from him, are in the custody or under the township's control for the purposes of section 4(1) of the *Act*. However, any records relating to the appellant's company held by the councillor that he did not send or copy to the township's officers or employees, such as emails to third parties, are the councillor's political records and are not in the custody or under the control of the township for the purposes of section 4(1).

[31] At the outset, I will address the councillor's brief submission that he "does not have the binder." It is not clear to me whether he is claiming that he used to have a binder containing records relating to the appellant's company but no longer has it, or if he is claiming that such a binder of records has never existed. Regardless, I prefer the appellant's more detailed and clear evidence, in which he states that the councillor brought a binder to the June 21, 2019 meeting and that it contained records relating to the matter involving the appellant's company. Given the councillor's documented involvement in this matter, it is simply not credible that he does not have records relating to this matter, and I find that such records likely exist.

[32] As noted above, the appellant believes, based on his interactions with the councillor at the June 21, 2019 meeting, that this binder contains copies of emails from the councillor to a number of parties, including individuals at the township (such as the mayor and deputy mayor) and third parties outside the township, such as representatives of a condo board and an insurance company.

[33] In determining whether such records are in the custody or under the control of the township, it is instructive to reiterate the facts surrounding their creation. As set out in the overview section of this order, the appellant's company had a contract to provide specific services to the township. On June 3, 2019, the Committee of the Whole, which is made up of elected councillors, met and then passed a motion to terminate the township's contract with the company. The following day, the township sent a letter to the company providing 30 days' notice of termination of the contract. On June 21, 2019, the appellant and other representatives of his company met with the town administration and elected officials, including the councillor, who apparently had a binder of records with him.

[34] In Order MO-2821, the adjudicator distinguished between city records, on the one hand (which would be subject to the *Act*), and political records, on the other (which would not). Based on the particular facts in this case, I find that any records held by the councillor relating to the matter involving the appellant's company that he sent or copied to the township's officers or employees, including emails from him, are in the custody or under the township's control for the purposes of section 4(1) of the *Act*.

These records would be integrated into the township's records on this matter and document the activities and decision making of the township's officers and employees.

[35] However, I find that any records held by the councillor relating to the appellant's company that he did not send or copy to the township's officers or employees and are not integrated into the township's records on this matter, are more akin to "political" records and are not in the custody or under the control of the township for the purposes of section 4(1) of the *Act*. This would include the councillor's emails to third parties, such as representatives of a condo board and an insurance company, but only if they were not sent or copied to the township's officers or employees.

[36] The township appears to have possession of all the councillor's emails on its server, including those that were not sent or copied to the township's officers or employees. However, these emails are on the town's server simply because councillors do not have a separate server for their emails. In these circumstances, I find that the township's "bare possession" of these latter emails on its server does not bring them in the custody or under the control of the township for the purposes of section 4(1) of the *Act*.<sup>33</sup>

[37] As noted above, where a councillor is acting as an "officer" or "employee" of the municipality, or is discharging a special duty assigned by council, they may be considered part of the "institution."<sup>34</sup> I have considered the appellant's submission that it is possible that the councillor who brought the binder to the June 21, 2019 meeting was an "officer" of the township because that councillor attended in his role/capacity as chair/presiding officer of the Protective Services Committee. This would mean that the latter records, which would normally be considered "political" in nature, might be in the custody or under the control of the township.

[38] I do not find this submission to be persuasive. The fact that the councillor was the chair/presiding officer of a committee of council does not transform him into an officer of the township. In my view, this role is political in nature and in the particular facts of this appeal, would not bring any records that the councillor did not send or copy to the township's officers or employees into the custody or under the control of the township for the purposes of section 4(1).

[39] I have also considered whether the township might have "control" of such records even through they are not in its possession. As noted above, in *National Defence*,<sup>35</sup> the Supreme Court of Canada adopted the following two-part test on the question of whether an institution has control of records that are not in its physical possession:

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<sup>33</sup> *City of Ottawa v. Ontario*, *supra* note 9.

<sup>34</sup> Order M-813.

<sup>35</sup> *Supra* note 29.

1. Do the contents of the document relate to a departmental matter?
2. Could the government institution reasonably expect to obtain a copy of the document upon request?

[40] With respect to the first part of the test, the facts show that the appellant's company had a contract to provide specific services to the township and the township terminated this contract after receiving direction to do so from council. In my view, the contents of any records that the councillor has in his possession relating to the appellant's company, including emails to third parties, would likely relate to a township matter, even if he did not send or copy them to the township's officers or employees. Consequently, the first part of the test is met.

[41] With respect to the second part of the test, I note that the court in *St. Elizabeth Home Society*<sup>36</sup> found that an elected member of a municipal council is not an agent or employee of the municipal corporation and is not in any way under the control of that corporation while in office. In these circumstances, I find that the township could not reasonably expect to obtain a copy of any records created by the councillor relating to the matter involving the appellant's company that he did not send or copy to the township's officers or employees, because they constitute his political records. In short, I find that the second part of the *National Defence* test is not met and such records are therefore not under the "control" of the township for the purposes of section 4(1) of the *Act*.

[42] I will now turn to determining whether the township conducted a reasonable search for those records sought by the appellant that are in its custody or under its control for the purposes of section 4(1) of the *Act*.

### **B. Did the township conduct a reasonable search for records?**

[43] The appellant believes that additional records should exist that were not located by the township, namely a specific email sent by the councillor to the mayor and the former deputy mayor relating to the matter involving the appellant's company.

[44] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17.<sup>37</sup> If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[45] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to

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<sup>36</sup> *Supra* note 30.

<sup>37</sup> Orders P-85, P-221 and PO-1954-I.

show that it has made a reasonable effort to identify and locate responsive records.<sup>38</sup> To be responsive, a record must be "reasonably related" to the request.<sup>39</sup>

[46] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.<sup>40</sup>

[47] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.<sup>41</sup>

[48] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.<sup>42</sup>

[49] For the reasons that follow, I find that as a result of additional efforts made by the township during this inquiry, it has now conducted a reasonable search for the records sought by the appellant, as required by section 17 of the *Act*.

[50] In its representations, the township states that when it initially received the appellant's access request, it contacted both the mayor and the deputy mayor, who both stated that they did not have any records that are responsive to the appellant's access request. The deputy mayor has since passed away.

[51] After receiving a Notice of Inquiry during the adjudication stage of the appeal process, the township states that it contacted the mayor again, who reiterated that he could not locate the records sought by the appellant.

[52] In his representations, the appellant states that he knows both the mayor and the former deputy mayor and respects their integrity. However, he submits that the email accounts for both of them are on the township's server and that a search for responsive records should be conducted by the township's staff.

[53] In its reply representations, the township states that it decided to ask its IT department to conduct an email search of the township email accounts covering the time period of February 4 to June 30, 2019, with keywords specific to the matter involving the appellant's company. As a result of this search, the township located a number of additional records, including emails that the councillor sent to officers or employees of the township, such as the mayor and the fire chief. These latter emails

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<sup>38</sup> Orders P-624 and PO-2559.

<sup>39</sup> Order PO-2554.

<sup>40</sup> Orders M-909, PO-2469 and PO-2592.

<sup>41</sup> Order MO-2185.

<sup>42</sup> Order MO-2246.

constitute records that the councillor sent or copied to the township's officers or employees and are therefore in the custody or control of the township for the purposes of section 4(1) of the *Act*.

[54] The township also located other records, including emails from the councillor to other individuals about the matter relating to the appellant's company. The township provided me with a redacted copy of the records and the names of some of the senders, recipients and individuals who were copied on the emails are not visible to me. In addition, there is insufficient evidence before me to determine whether the individuals involved in some of the email exchanges with the councillor are officers or employees of the township or third parties outside the township.

[55] As noted above, any records relating to the appellant's company held by the councillor that he did not send or copy to the township's officers or employees are not in the custody or under the control of the township for the purposes of section 4(1) of the *Act*. Consequently, if any of the emails located by the township are exchanges between the councillor and third parties outside the township, and the councillor did not send or copy them to the township's officers or employees, such records are not accessible under the *Act*.

[56] I will order the township to issue an access decision to the appellant with respect to the records that were located by its IT department, except for any email exchanges between the councillor and third parties that he did not send or copy to the township's officers or employees. These latter records are not in the custody or under the control of the township for the purposes of section 4(1) and therefore not accessible under the *Act*.

[57] As noted above, the appellant submits that a specific email sent by the councillor to the mayor and the former deputy mayor relating to the matter involving his company should exist. It is not entirely clear to me whether the emails located by the township that the councillor sent to officers or employees of the township, including the mayor and the fire chief, were also sent or copied to the former deputy mayor, because some of the recipients and individuals copied on these redacted emails are blacked out in the copies that the township sent to me.

[58] However, based on the additional search for records conducted by the township's IT department, I am satisfied that experienced township employees, knowledgeable in the subject matter of the appellant's access request, expended a reasonable effort to locate records that reasonably relate to that request. In my view, any emails that the councillor sent to the mayor and former deputy mayor about the appellant's company would have been located during this search, if they exist. In short, I find that the township conducted a reasonable search for records, as required by section 17 of the *Act*.

**ORDER:**

1. On the issue of whether the records sought by the appellant are in the custody or under the control of the township for the purposes of section 4(1) of the *Act*, I find that:
  - a. any records relating to the matter involving the appellant's company held by the councillor that he sent or copied to the township's officers or employees, including emails from him, are in the custody or under the control of the township for the purposes of section 4(1) of the *Act*; and
  - b. any records relating to the appellant's company held by the councillor that he did not send or copy to the township's officers or employees, such as emails to third parties, are the councillor's political records and are not in the custody or under the control of the township for the purposes of section 4(1).
2. I uphold the township's search for records that are responsive to the appellant's access request.
3. I order the township to issue an access decision to the appellant with respect to the additional records that were located by its IT department, except for any email exchanges between the councillor and third parties that he did not send or copy to the township's officers or employees. With respect to the timeframe for issuing this access decision, the township should treat the date of this order as the date of the access request and issue it in accordance with the requirements in sections 19 to 23 of the *Act*.

Original signed by: \_\_\_\_\_  
Colin Bhattacharjee  
Adjudicator

June 25, 2021  
\_\_\_\_\_